

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:

SANFORD P. KRIGEL,
Respondent.

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Supreme Court No. SC95098

INFORMANT'S BRIEF

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STATEMENT OF JURISDICTION

This action is one in which the Chief Disciplinary Counsel is seeking to discipline an attorney licensed in the State of Missouri for violations of the Missouri Rules of Professional Conduct. Jurisdiction over attorney discipline matters is established by this Court's inherent authority to regulate the practice of law, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

I. INTRODUCTION

In this attorney disciplinary matter, an Information was initiated against Respondent Sanford P. “Sandy” Krigel (“Respondent”) in February 2014. **S.App.¹⁴ - 12.** An evidentiary hearing was conducted on the Information by a Disciplinary Hearing Panel in December 2014. **S.App. 41 - 180.** Respondent did not admit to any violation of the Rules of Professional Conduct alleged in the Information. **S.App. 123 (Tr. 328).** A written decision of the Disciplinary Hearing Panel was issued in May 2015, sustaining the allegations on four of the eight instances of professional misconduct alleged in the Information. **S.App. 376 - 384.**

The Disciplinary Hearing Panel found that Respondent was guilty of several violations of the Rules of Professional Conduct, all arising from Respondent’s representation of a birth mother in March and April of 2010 in connection with a consensual termination of parental rights proceeding ancillary to contested adoption and

¹⁴There are two appendices accompanying Informant’s brief. Due to confidentiality concerns regarding sealed legal proceedings from the Jackson County Circuit Court involving adoption, paternity and consensual termination of parental rights, a redacted appendix has been submitted along with an unredacted Supplemental Appendix submitted under seal. All citations to the appendix in this brief will refer to the Supplemental Appendix or “S.App.”

paternity proceedings. **S.App. 378 – 384.** The specific violations found to exist were Missouri Supreme Court Rules 4-3.3(a)(3) (knowingly offering false evidence); 4-4.1(a) (false statement of material fact); 4-4.4(a) (using means to improperly burden or delay a third person); and 4-8.4(d) (conduct prejudicial to the administration of justice). **S.App. 383 - 384.**

After finding professional misconduct, the Disciplinary Hearing Panel recommended that a disciplinary sanction be imposed against Respondent of an indefinite suspension from the practice of law with no leave to apply for reinstatement for six months. **S.App. 384.** The Office of Chief Disciplinary Counsel accepted the panel's findings and recommendation. **S.App. 385.** Respondent rejected the decision and a briefing schedule was activated. **S.App. 386.**

II. DETAILED FACTUAL STATEMENT

A. BACKGROUND

In the latter part of 2009, *D.O.*² found out that his girlfriend, *B.S.*, was pregnant. **S.App. 54 (Tr. 50).** They had been in a monogamous relationship for over 2½ years. **S.App. 54 (Tr. 50).** They met while both were students attending a small university in Kansas approximately an hour's drive from Kansas City, Missouri. **S.App. 54 (Tr. 51).** At the time of the pregnancy, *D.O.* was 23 and *B.S.* was 22. **S.App. 54 (Tr. 50).**

²To protect the identities of the parties involved in the underlying legal proceedings, the biological parents are referred to herein by their initials only.

Biological paternity was not seriously at issue between the couple. **S.App. 131 (Tr. 354); 94 (Tr. 212)**. The expected due date for the birth was medically established as approximately April 8, 2010, but no due date had been established prior to a doctor's appointment in March. **S.App. 48 (Tr. 27)**. During the pregnancy, *B.S.* and *D.O.* discussed between themselves the pregnancy and the various options, including abortion, adoption and co-parenting. **S.App. 5; 54 (Tr. 52)**. Prior to March 5th, the couple talked about raising the child together. **S.App. 54 (Tr. 52); S.App. 76 (Tr. 140)**. They did not tell their respective parents of the pregnancy until March 5, 2010. **S.App. 5; 54 (Tr. 52)**.

In the Spring of 2010, *D.O.* received an undergraduate degree. **S.App. 185**. *D.O.* then moved back home with his parents in Johnson County, Kansas, near Kansas City, Missouri. **S.App. 54 (Tr. 51)**. *B.S.* also lived at home with her parents in Kansas City, Missouri about fifteen miles from *D.O.* but across the state line. **S.App. 184; 54 (Tr. 52)**. *D.O.* told *B.S.* of his desire to raise the baby as the custodial father at his parent's home. **S.App. 5; 54 (Tr. 52)**. He advised *B.S.* that she could participate in the parenting if she desired. **S.App. 5; 54 (Tr. 52)**. *D.O.* did not want to get married at that point. **S.App. 69 (Tr. 112)**.

After some initial discussions between the expectant parents and their respective families over a weekend in early March 2010 about co-parenting, marriage and adoption, the relationship and communications between the expectant mother and her parents on the one hand and the expectant father and his parents on the other hand sharply deteriorated. **S.App. 5; 54 (Tr. 52)**. The relationship between the expectant couple was

swiftly terminated. **S.App. 5; 54 (Tr. 52)**. The expectant mother's parents took steps to prevent the expectant father from having any further contact with the expectant mother, including a threat to seek a restraining order against *D.O.* **S.App. 5; 54 (Tr. 52); 55 (Tr. 54 -55)**. *D.O.* was not permitted to attend any medical appointments with *B.S.* after March 5, 2010. **S.App. 57 (Tr. 61)**.

Respondent met the expectant birth mother for the first time on March 11, 2010, and he was hired on that date. **S.App. 101 (Tr. 112)**. Respondent has handled hundreds, if not thousands, of adoptions over a 35-year legal career. **S.App. 115 (Tr. 293); 79 (Tr. 151)**. From the beginning, Respondent understood that *D.O.* was the biological father and that there was no serious question regarding paternity. **S.App. 131 (Tr. 354)**. Within a few days of being hired, Respondent understood that the objective for the client was to place the baby for adoption and to seek a consensual termination of the birth mother's parental rights. **S.App. 133 (Tr. 362 - 363)**. The scope of Respondent's representation of *B.S.* was to give advice "on her rights to move forward with an adoption." **S.App. 80 (Tr. 154 - 155)**. Respondent contemplated that he would be putting his client on the witness stand at a court hearing in approximately one month in connection with a legal proceeding for her to consent to the termination of her parental rights so that an adoption could proceed. **S.App. 110 (Tr. 275)**.

Respondent did not have any engagement letter, emails or other correspondence or written communications between himself and *B.S.* to present to the Disciplinary Hearing Panel regarding his legal strategy for the representation or his instructions to the client.

S.App. 145 (Tr. 411 - 412); 80 - 81 (Tr. 155 – 158). Respondent and *B.S.* talked in person and over the phone. **S.App. 81 (Tr. 158).**

D.O. met with and hired an attorney, Jeff Zimmerman, at about the same time in March 2010 to discuss his objection to an adoption. **S.App. 55 (Tr. 54).** Mr. Zimmerman’s law office is in Kansas, near *D.O.*’s residence. **S.App. 89 (Tr. 191).** Mr. Zimmerman handles business and real estate transactions. **S.App. 89 (Tr. 191).** Mr. Zimmerman does not handle adoptions, but he knew that Respondent did. **S.App. 90 (Tr. 193).**

D.O. expressed to Mr. Zimmerman that he would not consent to an adoption. **S.App. 55 (Tr. 54).** On March 19, 2010, Mr. Zimmerman contacted Respondent by telephone to discuss the situation between the expectant parents. **S.App. 375.** Mr. Zimmerman and Respondent had been acquaintances or friends since junior high school. **S.App. 87 (Tr. 184).** Respondent knew that Mr. Zimmerman’s office was in Kansas, and Respondent never saw Mr. Zimmerman in a Missouri adoption court. **S.App. 103 – 104 (Tr. 248 - 249).** There is a very, very small group of local practitioners who handle Missouri adoptions, and respondent knew that Mr. Zimmerman was not one of them. **S.App. 198 (Tr. 422).**

Mr. Zimmerman testified that he told Respondent that *D.O.* did not want to consent to an adoption. **S.App. 90 (Tr. 194); 95 (Tr. 213).** Responded testified that he does not remember Mr. Zimmerman “categorically telling me that his client didn’t want the adoption to go forward.” **S.App. 148 (Tr. 421).** Mr. Zimmerman testified that

Respondent made a statement of fact to him during the telephone conversation that there would be no adoption without the consent of the biological father. **S.App. 90 - 91 (Tr. 194 - 197); 97 (Tr. 221 - 222); 99 (Tr. 229-230); S.App. 320.** Respondent denied making such statement and denied that any statement made during the conversation was a statement of fact. **S.App. 143 - 144 (Tr. 404 - 405).**

Respondent testified that he understood that a conversation such as the one he had with Mr. Zimmerman involving a potential adoption and the parental interests of expectant parents is “hugely important” because a birth and the options of parenting and adoption are “life changing, life altering, significant” events in a person’s life. **S.App. 99 (Tr. 232).** Respondent understood the importance of parental rights and the legal rights of biological parents. **S.App. 99 (Tr. 232).** Respondent testified:

Q. Mr. Krigel, would you agree that the subject matter of your conversation with Mr. Zimmerman was hugely important in the lives of these two young folks?

A. I think every conversation that I have with somebody about an adoption is hugely important, yes.

Q. Being life changing, life altering, significant level of events in a person's life?

A. Yes, that's the nature of adoption.

Q. And I would assume that you, of all people, probably understand the importance of parental rights and the legal rights of biological parents?

A. I don't know if I have any corner on that market but I can understand those issues, yes.

Q. The right to parent and the right not to parent are very important fundamental rights that are deserving of legal protection; correct?

A. Yes, constitutionally protected rights.

Q. And you would have an understanding that due process certainly comes into play in the type of work that you do?

A. Absolutely.

S.App. 99 (Tr. 231 - 232).

Also during the phone conversation, Mr. Zimmerman expressed his belief to Respondent that the expectant couple needed counseling away from any familial interference in their decisions. **S.App. 92 (Tr. 203); 94 (Tr. 211); 95 (Tr. 213 - 214).** Respondent agreed with this assessment. **S.App. 147 (Tr. 420).** Mr. Zimmerman asked Respondent if he knew of a counselor the young couple could meet with. **S.App. 95 (Tr.**

214). Respondent suggested Hillary Merryfield could provide them with counseling. **S.App. 91 (Tr. 198)**. Mr. Zimmerman agreed to Respondent's recommendation of Ms. Merryfield. **S.App. 91 (Tr. 198)**. Both Respondent and Mr. Zimmerman helped to set up the counseling appointment between Ms. Merryfield and the expectant couple. **S.App. 91 (Tr. 198); 85 (Tr. 174)**.

Ms. Merryfield and Respondent had worked with one another for years. **S.App. 83 (Tr. 168); 163 (Tr. 483)**. Ms. Merryfield referred *B.S.* to Respondent for legal representation. **S.App. 80 (Tr. 154); S.App. 85 (Tr. 174)**. At the time of the phone conversation between Respondent and Mr. Zimmerman, Respondent was aware that Ms. Merryfield's specialty was to facilitate adoptions and that she ran an adoption placement agency. **S.App. 84 (Tr. 171)**. Respondent was also aware at the time of the phone call that Ms. Merryfield and *B.S.* had already been working together on an adoption assessment. **S.App. 84 (Tr. 169 - 170); 134 (Tr. 366)**. Ms. Merryfield was to serve as the court-appointed professional who would recommend to the court whether the adoption and transfer of custody should be approved. **S.App. 83 (Tr. 166 - 167)**.

Before making the recommendation that the expectant couple meet with Ms. Merryfield, Respondent had already had discussions with Ms. Merryfield regarding a prospective adoptive set of parents and whether this was an appropriate adoption scenario. **S.App. 134 (Tr. 366)**. Mr. Zimmerman testified that Respondent did not disclose these circumstances regarding Ms. Merryfield to him during the phone conversation. **S.App. 91 (Tr. 199); 92 (Tr. 202 - 203); 96 (Tr. 217); 97 (Tr. 222)**.

Respondent did not tell Mr. Zimmerman that Ms. Merryfield had actual involvement in arranging for this particular adoption. **S.App. 96 (Tr. 217).**

Respondent testified that he did not have an ethical obligation to tell Mr. Zimmerman any of the facts regarding Respondent's communications with Ms. Merryfield nor of his client's objective to seek an adoption. **S.App. 135 (Tr. 370 – 371).** Respondent testified that there is nothing irregular about his recommendation for *D.O.* (who wanted to raise the child rather than give it up for adoption) to receive counseling from a person such as Ms. Merryfield who runs an adoption agency and who would serve as the court-appointed professional to provide a recommendation approving the adoption. **S.App. 84 (Tr. 172).** Respondent testified that he told Mr. Zimmerman that Ms. Merryfield had already been working with the expectant mother, but Respondent could not recall what he told Mr. Zimmerman about the nature of their work together. **S.App. 83 – 84 (Tr. 168 – 169).**

On March 22, 2010, *D.O.* and *B.S.* met at Ms. Merryfield's office. **S.App. 56 (Tr. 57 – 58).** At this meeting, *D.O.* was not fully aware that Ms. Merryfield and *B.S.* had already been working together to complete a written adoption plan and a birth parent home study, i.e. that an adoption proceeding would proceed without *D.O.*'s consent. **S.App. 56 (Tr. 57 – 60); 73 (Tr. 127).**

D.O. went to the meeting at Ms. Merryfield's office with the understanding that she would provide couples "counseling" for *D.O.* and *B.S.* **S.App. 56 (Tr. 58).** There is a sign on the door to Ms. Merryfield's office stating "Adoption Option, Inc." **S.App. 72**

(Tr. 122). However, *D.O.* was not aware that Ms. Merryfield ran an adoption placement agency. **S.App. 56 (Tr. 57)**. This meeting was more of an “adoption persuasion” meeting than any actual counseling session for the couple. **S.App. 56 (Tr. 58)**. Ms. Merryfield testified that she did not view the purpose of the meeting as therapy or counseling, but rather as a mediation for the couple to make a decision for the best interest of the child. **S.App. 167 (Tr. 498; 172 (Tr. 518)**. Ms. Merryfield claimed that only *B.S.*, not *D.O.*, was her client during the March 22, 2010 meeting. **S.App. 172 (Tr. 519 - 520)**.

During the meeting, Ms. Merryfield told *D.O.* that she helps people decide to place children up for adoption. **S.App. 73 (Tr. 125)**. At this meeting, *D.O.* expressed to Ms. Merryfield that he was against an adoption. **S.App. 170 (Tr. 512); 172 (Tr. 517)**. At the meeting, *D.O.* expressed that he would not consent to an adoption. **S.App. 56 (Tr. 59)**. At this meeting, *D.O.* was under the belief that in order for an adoption to occur, he would have to “sign his rights away.” **S.App. 77 (Tr. 141)**. *D.O.* was not familiar with the Missouri Putative Father Registry.³ **S.App. 77 (Tr. 141)**.

³An expert witness, Professor Mary M. Beck, testified that very few persons ever register for the putative father registry in Missouri. **S.App. 159 (Tr. 466 - 467)**. In the fifteen-year history of the registry, a total of just over fifty persons have registered. **S.App. 159 (Tr. 466 - 467)**. During the “counseling” session, Ms. Merryfield did not provide *D.O.* with any counseling about the Missouri Putative Father Registry. **S.App. 173 (Tr. 523)**.

Ms. Merryfield testified that she considered her session with *D.O.* and *B.S.* to be confidential, and thus she did not contact *D.O.*'s attorney with any follow-up after the appointment. **S.App. 167 (Tr. 498 - 499).** Respondent stated that it would be inappropriate for him to ask Ms. Merryfield about her notes and materials from the counseling session because of privilege issues. **S.App. 86 (Tr. 179).** However, Respondent and Ms. Merryfield did discuss the session between themselves because Respondent was "particularly interested" in Ms. Merryfield's reaction to the biological father during this meeting. **S.App. 134 (Tr. 366); 169 (Tr. 506 - 507).**

Respondent had received information from his client and her family that *D.O.* was a very shy, passive and reserved individual. **S.App. 109 (Tr. 272).** What Respondent learned from Ms. Merryfield (i.e. that *D.O.* was very passive by nature and thus not likely to contest an adoption) was consistent with what Respondent had already learned from his client and her family. **S.App. 83 (Tr. 165); S.App. 137 (Tr. 380).** Ms. Merryfield assured Respondent that *D.O.* was very passive and that he "would pretty much sit on his hands and let things happen."⁴ **S.App. 83 (Tr. 165).** The verbal report from Ms.

Ms. Merryfield has never seen any information publicly available anywhere regarding the Missouri Putative Father Registry. **S.App. 173 (Tr. 524).**

⁴It is unknown whether *D.O.* signed any consent for Ms. Merryfield to discuss the meeting with Respondent.

Merryfield after the meeting between *D.O.* and *B.S.* “significantly impacted” Respondent’s recommendation to his client. **S.App. 137 (Tr. 380).**

Ms. Merryfield told Respondent that *B.S.* wanted to proceed with the adoption plan. **S.App. 169 (Tr. 506).** In turn, Respondent also shared this information with Michael Belfonte, the attorney for the prospective adoptive couple, so that the two attorneys could remain on the same “wave length.” **S.App. 138 (Tr. 383).** Respondent did not contact Mr. Zimmerman to discuss Ms. Merryfield’s impression of *D.O.* **S.App. 87 (Tr. 181 – 182).** Ms. Merryfield sent her written report to Respondent recommending an adoption in late March 2010, and Respondent filed the report with the Jackson County Circuit Court in connection with a court proceeding in April 2010. **S.App. 171 (Tr. 513 – 514).**

D.O. and *B.S.* met for lunch at McDonald’s a day or two after the meeting with Ms. Merryfield. **S.App. 55 (Tr. 56); 103 (Tr. 245); 137 (Tr. 378).** In late March 2010, sometime after the lunch meeting, *D.O.* received a computer instant message⁵ from *B.S.* stating that the due date had been pushed back from April 8, 2010 until May purportedly because the baby’s lungs had not been fully developed. **S.App. 54 (Tr. 61 - 63).** This communication was false. **S.App. 57 (Tr. 64).** The due date never changed. **S.App. 57 (Tr. 64).** However, *D.O.* believed the new information about the revised due date was

⁵*B.S.*’s parents had blocked all cell phone calls and text messages from *D.O.* earlier in the month of March. **S.App. 55 (Tr. 55).**

correct. **S.App. 57 (Tr. 64)**. As a result, *D.O.* was expecting the birth to occur in May. **S.App. 57 - 58 (Tr. 63 - 66)**.

In his mind, *D.O.* believed there was going to be no adoption. **S.App. 62 (Tr. 84)**. The Circuit Court judge who presided over the underlying trial found this to be a reasonable belief in light of the phone conversation between Respondent and Mr. Zimmerman. **S.App. 198**. Adoptions are not public proceedings, and docket information for adoptions are not accessible to the public by searching case.net. **S.App. 101 (Tr. 239)**. Because of confidentiality constraints, *D.O.* would not have had any notice of the legal proceedings unless provided by Respondent or one of the participants. **S.App. 106 (Tr. 260)**. Notice of the adoption was not published to the public. **S.App. 178 (Tr. 544)**.

The actual birth of the child occurred prior to the April 8, 2010 due date.⁶ **S.App. 184**. A legal proceeding was initiated by Respondent on behalf of *B.S.* in April to consent to the termination of her parental rights and a transfer of custody of the newborn child. **S.App. 307 – 308**. A hearing on the Petition initiated by Respondent was held in April, excerpts from which are set forth in detail below. **S.App. 215 – 234**. The family court commissioner accepted *B.S.*'s consent to terminate her parental rights based upon the testimony and record received at the April 2010 hearing requested by Respondent.

⁶In various places, the supplemental appendix submitted under seal will reveal the actual date of birth. *See e.g.* **S.App. 184**. For purposes of preserving confidentiality in this matter, the date of birth is not set forth in this brief.

S.App. 233; 279 – 281; 300 - 304. Thereafter, the family court commissioner approved the delivery of the child into the custody of the prospective adoptive couple. **S.App. 276.** The prospective adoptive couple brought the child to their home about thirty miles north of Kansas City. **S.App. 115 - 116 (Tr. 296 - 297).** The prospective adoptive couple had custody of the child from April 2010 to May 2011. **S.App. 115 - 116 (Tr. 296 - 297); 181 - 183.**

In April 2010, *D.O.* and *B.S.* had extensive electronic communications, though the former couple did not meet in person and did not have visual communications such as Skype or FaceTime in April. **S.App. 58 (Tr. 65 – 66).** Throughout April and the first week of May, the communications⁷ of *B.S.* to *D.O.* were such as to give *D.O.* the impression that the birth had not yet occurred. **S.App. 58 (Tr. 66).** The communications in April and May 2010 indicated that *B.S.* was willing to meet with *D.O.* in person at some point after early June 2010. **S.App. 61 (Tr. 77).**

The deliberate decision not to tell *D.O.* the date of the birth of his own child was based upon Respondent's legal advice and strategy. **S.App. 190.** *D.O.* did not receive any notice or communication of the birth until approximately May 11, 2010 following a

⁷The content of the communications was excluded from evidence by the hearing panel. The electronic communications were taken and recorded with the case as offered Exhibit 19, Exhibit 24, Exhibit 25, Exhibit 31, pursuant to Mo.R.Civ.P. 73.01(a). **S.App. 60 (Tr. 76); 62 (Tr. 81); 121 (Tr. 320).**

Facebook posting. **S.App. 61 (Tr. 79)**. The Circuit Court judge presiding over the trial of the underlying legal proceedings found that *D.O.* “did not learn of his son’s birth within the meaning of the law as a result of the deception that was perpetrated upon him.” **S.App. 192**. The judge further found that the acts and omissions of *B.S.* and the prospective adoptive couple misrepresented or concealed the birth from *D.O.* **S.App. 193**.

After meeting with Ms. Merryfield, from March 23, 2010 until May 11, 2010, *D.O.* was not given a specific opportunity to tell his position as to his parental rights to any government agency, social worker or judge. **S.App. 61 (Tr. 78 - 79)**. *D.O.* did not know which hospital where the birth occurred, nor even which state (as between Missouri and Kansas) where the child had been born. **S.App. 62 (Tr. 82 - 83)**. *D.O.* was not identified as the father on the birth certificate. **S.App. 62 (Tr. 83)**. The Circuit Court judge who presided over the underlying trial found that *B.S.* intentionally failed to identify *D.O.* as the father of her son on the birth certificate she completed. **S.App. 189**. *D.O.* was not provided with a copy of the birth certificate. **S.App. 62 (Tr. 83 – 84)**. *D.O.* was not invited to the hospital to see the child after birth. **S.App. 62 (Tr. 83 – 84)**.

Very soon after finding out on or about May 11, 2010 about the birth of his child, *D.O.* contacted his attorney, Jeff Zimmerman, who in turn referred *D.O.* to another attorney, Michael Whitsitt. **S.App. 62 (Tr. 84)**. By May 13th or 14th, Mr. Whitsitt mailed a form to the Missouri Putative Father Registry registering *D.O.* as the biological father. **S.App. 62 (84)**. Shortly thereafter in May 2010, Mr. Whitsitt discovered that there was a

pending adoption proceeding in the Circuit Court of Jackson County, Missouri involving *D.O.*'s child and that there had already been a completed legal proceeding for the birth mother, *B.S.*, to consent to a termination of her parental rights. **S.App. 63 (Tr. 85).**

Based upon their telephone call from March 19, 2010, Mr. Zimmerman expected a "head's up" from Respondent regarding the commencement of the adoption legal proceeding. **S.App. 98 (Tr. 225 – 226).** When asked about his reaction upon learning that Respondent had initiated a legal proceeding less than three weeks after their phone call, Mr. Zimmerman testified:

Q. With all sensitivity to your high regard for Mr. Krigel, did you feel that the commencement of these legal proceedings was contrary or inconsistent with the tenor of your phone call?

A. I did and I felt that since he knew who the birth father was and he knew that I could communicate with him that there might have been a phone call or something to let me know that an adoption was proceeding.

Q. And you never got a heads-up from Mr. Krigel?

A. No.

S.App. 92 (Tr. 201).

Mr. Whitsitt, along with co-counsel Don Peterson, filed an Answer on May 25, 2010, in the adoption proceeding objecting to the adoption on behalf of *D.O.* **S.App. 282 – 286.** They also filed a related paternity action on May 21, 2010 in the Circuit Court of Jackson County, Missouri on behalf of *D.O.* **S.App. 263; 289.** The paternity action was later consolidated with the contested adoption matter. **S.App. 287.** The matters were tried to the court over several days in April and May 2011. **S.App. 181; 287.** By Judgments entered May 5, 2011, and June 24, 2011, *D.O.* prevailed in both actions. **S.App. 181 – 206; 287 – 299.** *D.O.* was adjudicated to be the biological father of the child. **S.App. 288.** *D.O.* was awarded sole and exclusive custodial and parental rights. **S.App. 204.** The Judgments were not appealed, and they became final. **S.App. 250 - 252; 264; 64 (Tr. 92).** However, in litigating such actions, *D.O.* incurred \$50,000 to \$70,000 in legal fees.⁸ **S.App. 64 (Tr. 92).**

D.O. missed out on the first thirteen months of his child's life. **S.App. 64 - 65 (Tr. 92 - 95).** *D.O.* was not able to be present for any of the milestones in his son's first

⁸*D.O.*'s annual earnings were \$25,000 as of 2011. **S.App. 297.** The trial court awarded attorney fees to *D.O.* essentially as a sanction against *B.S.* and the adoptive couple for their improper conduct. **S.App. 203 – 204.** *B.S.* was ordered to pay \$15,256 to *D.O.* **S.App. 298.** Respondent does not know if his client satisfied the court's order. **S.App. 122 (Tr. 322).** The unsuccessful adoptive couple was ordered to pay \$38,000 in attorney fees to *D.O.* as a sanction. **S.App. 204.**

year of life. **S.App. 65 (Tr. 94).** *D.O.* did not have custody of his child until the Judgment was entered in May 2011. **S.App. 64 - 65 (Tr. 92 - 95).** *D.O.*'s visitation rights with the child were substantially limited during the pendency of the legal proceedings until judgment was entered. **S.App. 64 - 65 (Tr. 92 - 95).** *D.O.* was allowed a total of one hour of supervised visitation with his child from birth to five months old. **S.App. 193 – 194.** *D.O.* wanted as much visitation as he could get. **S.App. 65 (Tr. 94).** Through litigation with the prospective adoptive couple, *D.O.* fought to get the visitation up to seven hours unsupervised on Saturdays. **S.App. 194.**

The termination of rights proceeding had been initiated in April 2010 by Respondent, while the actual adoption proceeding was initiated at the same time by counsel, Michael Belfonte, on behalf of the prospective adoptive couple with Respondent's knowledge and assistance. **S.App. 307 – 308; 276; 101 (Tr. 238); S.App. 100 (Tr. 235); 103 (Tr. 245); 118 (Tr. 312); 120 (Tr. 313 – 314); 138 (Tr. 383).** Respondent did not contact *D.O.* or his attorney, Jeff Zimmerman, at all during this time period of late March 2010 to May 11, 2010. **S.App. 104 (Tr. 249 – 250).** Respondent had all of *D.O.*'s contact information, including his address, telephone number, social security number and date of birth at the time of the April hearing. **S.App. 85 (Tr. 176); 103 (Tr. 247 – 248).** Respondent also knew how to contact *D.O.*'s attorney, whom Respondent had known for decades. **S.App. 103 (Tr. 248).** The disciplinary hearing panel found that “the failure to notify the father or his attorney was purposeful and based

upon legal advice provided by Respondent, and was designed to impair the father's ability to assert his parental rights." **S.App. 380.**

At the time of the termination of parental rights and consent to adoption hearing, the 15-day statutory period for *D.O.* to have placed his name on the putative father registry had not yet expired. **S.App. 107 (Tr. 261).** The decision to refrain from notifying *D.O.* of the hearing was not based upon *D.O.*'s failure to register. **S.App. 107 (Tr. 261).** However, the hearing would have been "pointless" had *D.O.* registered because *B.S.* would not have consented to the adoption if *D.O.* had registered. **S.App. 107 (Tr. 261).**

Respondent testified about his communications with the birth mother, *B.S.*, her anticipated testimony at the consent hearing, and his instructions to her:

Q. How long had you known the birth mother before the April 2010, consent hearing?

A. First time I met her was on March 11th, so less than a month.

Q. What did you know about her background?

A. Just what she told me and what Miss Merryfield related to me. Didn't know a great deal more than what was in the documents filed with the court.

Q. In that short period of time were you able to form any reliable opinion as to her veracity?

A. I thought I had but the answer is no, I obviously did not. I did not have a good handle on her veracity.

Q. Did you tell your client something about a 15-day period?

A. I explained how the Missouri Putative Father Registry worked, that does involve a 15-day period.

Q. So she was made aware of the importance of timing, is that right?

A. Oh, yes, all my clients are made aware of the importance of timing in adoption actions.

Q. The timing being either a 15-day period or a 60-day period?

A. Well, it's a little more complicated than that but, yes, there is a 60-day period for abandonment, there's a 15-day period having to do with filing of the Putative Father Registry and filing a paternity action.

Q. And you explained the significance of those periods of time to her?

A. I always do with my clients, yes.

Q. There was testimony this morning that the birth mother had agreed to meet with the father after June [date omitted]. Do you remember that testimony?

A. I don't. Was it birth father's testimony?

Q. Yes, it was. Keeping with our confidentiality constraints, would you agree with me that June [date omitted] would be an important, significant date --

A. Yes.

Q. -- in this matter?

A. Yes, yes.

S.App. 101 – 102 (Tr. 239 – 241).

* * *

Q. Did you do anything to encourage communication between the young couple?

A. No, I suggested to my client that the parties' agreement that had existed before I ever got involved in the case, that

they only communicate through lawyers and that there not be further communication between the birth mother and birth father, I suggested to her my advice to her was that probably was a good idea under the circumstances.

S.App. 102 – 103 (Tr. 244 – 245).

Respondent testified that he was not aware, until many months later, that his client had made false statements to *D.O.* regarding the revised due date or that *B.S.* and *D.O.* had met at McDonald's in late March. **S.App. 139 (Tr. 385).** When asked whether he performed any factual investigation of his own to verify *B.S.*'s statements to him, Respondent stated that he did not independently verify information provided by his client. **S.App. 104 (Tr. 249).** Respondent did not ask to check his client's text messages or social media from March and April 2010 regarding her communications with *D.O.* or the prospective adoptive couple. **S.App. 110 (Tr. 275).**

Respondent, having handled many, many adoptions over a 35-year legal career, testified that he was manipulated by a 22-year old client. **S.App. 144 (Tr. 407).** Respondent testified that the client, *B.S.*, had lied to him. **S.App. 144 (Tr. 407).** When asked how he could have prevented this situation, Respondent testified that he regretted not having a better understanding of his client's pain and turmoil and that he should have spent more time with her and made more effort to sympathize with her. **S.App. 144 (Tr. 408).**

Respondent testified that he would not have arranged for the April consent hearing had he known that *B.S.* had been communicating with *D.O.* throughout March, including the false communication regarding the revised due date being pushed back to May. **S.App. 145 (Tr. 410).**

There was doubt in Respondent's mind as to whether *D.O.* would affirmatively consent to the adoption. **S.App. 132 (Tr. 360).** On the other hand, Respondent believed that it was unlikely that *D.O.* would take affirmative action to prevent an adoption, particularly in the 15-day and 60-day period following birth. **S.App. 132 (Tr. 360).**

Prior to May 12, 2010, *D.O.* was not notified in any fashion as to the birth or of any legal proceedings involving the child. **S.App. 61 (Tr. 77 – 78); 63 (Tr. 85).** This was by design, pursuant to a legal strategy developed, approved and/or implemented by Respondent. **S.App. 221; 81 (Tr. 158).** The strategy was referred to throughout the proceeding as a “passive strategy” and a strategy to “actively do nothing.” **S.App. 81 (Tr. 158); 107 (Tr. 262).** The strategy was to refrain from providing any information to the biological father or having any dealings with him in the weeks leading up to the birth and for a period of at least thirty days after the birth, in anticipation that the biological father would not come forward or take affirmative action to assert his paternity. **S.App. 81 (Tr. 159 – 160); 100 (Tr. 233).** Respondent instructed his client not to tell *D.O.* anything. **S.App. 61 (Tr. 244).**

Respondent's testimony on his legal strategy in representing the birth mother included the following:

Q. Was it part of your strategy to deprive the father of an opportunity to gain information about something as fundamental and critical as the date of his child's birth?

A. Absolutely not. That was not our strategy. Our strategy was to see if he would step forward and do those things he was supposed to do.

Q. And as this played out, isn't that what happened? Wasn't the father deprived of an opportunity to gain information about the birth of his child?

A. He wasn't deprived of anything that he and his attorneys couldn't have remedied if they followed the law.

S.App. 100 (Tr. 233).

* * *

Q. Was the first component of your strategy to seek the father's consent?

A. Oh, you always try to get a father's consent if you do an adoption. But this case really was one where this couple should have gotten together and raised this child. We're not talking about a one-night stand here.

Q. Well, in this particular case with your particular strategy that you developed, was a component of that strategy to seek the consent of the biological father?

A. I'm not sure that we ever did anything to seek his consent. First of all, I wasn't the adoption attorney. I represented the birth mother. I only represented her with respect to her consent to the adoption. The strategy as far as going forward with the adoption, you'll have to ask Mr. Belfonte about that. He's the one that did that.

Q. Didn't you confer with Mr. Belfonte about your strategy?

A. Well, I don't want to take control of the strategy but Mr. Belfonte is a very experienced adoption practitioner. He used to work with me. I can't tell you whether it was his idea or my idea but anybody who does adoptions regularly knows that you wait and see if the father does what he's required to do under Missouri law.

Q. And I'm not asking anyone to take credit for an idea, I'm saying didn't you have specific conversations with Mr. Belfonte about the strategy for this particular case?

A. We didn't need to. If we did, you know, we both understood the law very well. We realized that this adoption wasn't going to go forward if the birth father and his attorneys did what they should have done under Missouri law.

S.App. 100 (Tr. 234 – 235).

* * *

Q. Just so I'm clear, was there a component of your strategy to seek the birth father's consent?

A. You have to ask Mr. Belfonte that question. He's the one that filed the adoption action. After birth mother gave her consent, I would have been out of this case. I would have been long gone.

Q. Did you take any actions on your own -- did you take any actions yourself to seek the consent of the biological father for an adoption?

A. No, no, that would not have been my place.

S.App. 100 (Tr. 235 – 236).

* * *

Q. Did you do anything to notify the birth father or his attorney of the consent to termination of parental rights proceeding that your client was involved in?

A. No, there was no legal requirement to do so.

Q. Did you do anything to ensure that the birth father or his attorney had notice of the adoption proceeding?

A. No.

S.App. 101 (Tr. 237 – 238).

Respondent's strategy for the representation was described as follows:

Q. Did you develop a strategy for the representation of the birth mother?

A. We discussed the process that needed to be followed under Missouri law, yes.

Q. And would you call that developing a strategy?

A. Could call it that. It was -- for passive strategy it was to actively do nothing.

Q. But that was what you would call a strategy for this?

A. I'd call that a passive strategy, rather than affirmatively doing things sometimes it's better just to wait and see if people do what they are supposed to do.

S.App. 81 (Tr. 158 – 159).

Among other things, the strategy was based upon a common impression that *D.O.* was a “passive,” “shy,” “sad,” “insecure,” and “reserved” “loner.” **S.App. 109 (Tr. 272); 114 (Tr. 289); 132 (Tr. 360); 150 (Tr. 432); 168 (Tr. 502); 173 (Tr. 518).** The strategy was also based upon Respondent’s assessment that the adoption would take place in Missouri, thereby implicating the Missouri Putative Father Registry. **S.App. 112 – 113 (Tr. 284 - 286).** The social worker’s report contains a written statement that the adoption would take place in Johnson County, Kansas.⁹ **S.App. 309.**

Kansas does not have a father registry. **S.App. 112 (Tr. 284).** The child could have been conceived in either Missouri or Kansas. **S.App. 54 (Tr. 50 – 51); 68 (Tr. 105 – 106).** The father lived in Kansas. **S.App. 54 (Tr. 50 – 51).** Ms. Merryfield’s office (where the adoption was arranged and where the couple met for counseling) was located in Kansas. **S.App. 56 (Tr. 57).** *D.O.* did not know which hospital where the birth was to occur, nor even which state (as between Missouri and Kansas) where the child was to be

⁹Ms. Merryfield testified the reference to Johnson County, Kansas was a big error. **S.App. 170 (Tr. 510).**

born. **S.App. 62 (Tr. 82)**. *D.O.* initially selected an attorney with an office in Kansas. **S.App. 89 (Tr. 191)**.

Respondent testified at times during the disciplinary hearing that his role in implementing the “passive strategy” was limited to his involvement in a termination of parental rights proceeding which was concluded in early April 2010. **S.App. 101 (Tr. 238)**. The disciplinary hearing panel found that the passive strategy was based upon Respondent’s legal advice and instructions to his client and it also found that Respondent was responsible for the “overall implementation” of the strategy. **S.App. 384**. Respondent testified that even though he was not the attorney bringing the adoption proceeding, he worked with the attorney, Michael Belfonte, representing the prospective adoptive couple. **S.App. 100 (Tr. 235; 103 (Tr. 245); 118 (Tr. 312); 120 (Tr. 313 – 314); 138 (Tr. 383); 81 (Tr. 159)**.

Respondent received \$22,000 in legal fees for the work involved in representing the birth mother. **S.App. 123 (Tr. 328)**. Respondent testified that he spent less than 10 hours of work on this client matter in March and April 2010. **S.App. 104 (Tr. 249)**.

Respondent signed and submitted a pleading to the circuit court under Rule 55.03 in connection with the consent to terminate parental rights and consent to adoption proceeding. **S.App. 307 – 308**. The pleading states: “Petitioner [*B.S.*] knows of no other person not a party to these proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to this child.” **S.App. 307**. Respondent prepared, signed, and submitted to the Circuit Court a “Consent to Termination of

Parental Rights and Consent to Adoption.” **S.App. 279 – 281.** The Consent contains a representation by *B.S.* that she had not falsely represented to the father that she “was not pregnant” or that the pregnancy “was terminated.”¹⁰ **S.App. 280 – 281.**

Respondent did not seek any ethics opinions as to whether a purposeful strategy based upon refraining to provide notice of an actual legal proceeding pending in a Missouri circuit court to a known biological father with a known attorney with a known objection to the adoption would comport with the Rules of Professional Conduct. **S.App. 81 - 82 (Tr. 160 – 162).**

Respondent’s “passive strategy” is not unique amongst Missouri attorneys who practice in this area of the law. **S.App. 123 (Tr. 326 – 327).** Unless the Supreme Court rules otherwise or unless the law changes, Respondent testified that he intends to utilize the same strategy in future contested adoption cases. **S.App. 123 (Tr. 326 – 327).** Over foundation objection, Professor Mary Beck, testifying as an expert witness, gave the opinion that it was reasonable and within the ordinary practice of Missouri adoption attorneys representing the birth mother to utilize the “passive strategy” in cases where there is a known biological father who has obtained known legal representation to object

¹⁰R.S.Mo. § 192.016 addresses situations when a birth mother misrepresents (a) the mother was not pregnant when in fact she was; or (b) the pregnancy was terminated when in fact the baby was born. Here, the birth mother misrepresented the duration of the pregnancy when in fact she had already delivered and the baby had already been born.

to the adoption and where such biological father has made statements to the birth mother and the court-appointed social worker that he objects to the adoption. **S.App. 157 - 158 (Tr. 457 – 461)**. Professor Beck went on to give the opinion, over objection, that the testimony elicited by Respondent at the April hearing was consistent with usual and customary practices in the state. **S.App. 158 (Tr. 461 – 462)**.

At the time of the various parental rights proceedings in 2010, Respondent had practiced law in Missouri for over thirty years. **S.App. 79 (Tr. 151)**. He had substantial experience in adoption law and in litigation involving adoptions. **S.App. 80 (Tr. 153)**. Respondent testified that he is known for handling contested adoption litigation. **S.App. 80 (Tr. 153)**.

Respondent was present in the courtroom the entire time his client testified for the April 2010 hearing. **S.App. 106 (Tr. 258)**. Respondent was allowed to make any record or voice any objection at the hearing he felt necessary. **S.App. 106 (Tr. 258)**. Respondent made arrangements for his client, *B.S.*, to testify. **S.App. 106 (Tr. 259)**. Respondent also made arrangements for Ms. Merryfield to testify at the hearing. **S.App. 106 (Tr. 259)**. Respondent was aware that his client, *B.S.*, was placed under oath prior to giving any testimony. **S.App. 107 (Tr. 264)**. Respondent discussed his intended direct examination with *B.S.* prior to the hearing. **S.App. 107 (Tr. 264)**. Respondent testified that the record upon his Petition to Approve Consent and Transfer of Custody was intended to be a very quick “ten-minute hearing” because there are lots of adoptions in

Jackson County and the court may have several hearings scheduled back-to-back in the same day. **S.App. 114 (Tr. 291)**.

The testimony of *B.S.* and Ms. Merryfield elicited by Respondent at issue in the hearing¹¹ is recited as follows:

Respondent:

Q. Okay. Now you and I have had the unusual opportunity in that we have been talking for many, many weeks now, have we not?

B.S.: A. Yes.

Respondent: Q. Okay. We were introduced by Hillary Merryfield, is that correct?

B.S.: A. Yes.

Respondent: Q. Okay. And I've had an opportunity to meet with both your mother and your father. You and I have had a bunch of telephone conversations?

B.S. A. Yes, we have.

¹¹The entire transcript of the hearing is located at **S.App. 215 – 249**. Excerpts from the transcript are provided below in such a fashion as to maintain the confidentiality of the sealed record.

Respondent: Q. And I know we had a lengthy meeting in my office, is that right?

B.S. A. Yes.

Respondent: Q. And the reason that we met several weeks before the child was born was because we were concerned what actions, if any, the biological father of the child may have, what he may or may not do with respect to this adoption, is that correct?

B.S. A. Yes.

S.App. 220 – 221.

* * *

Respondent: Q. Okay. And we've talked about [D.O.] at some length, have we not?

B.S. A. Yes.

Respondent: Q. And while there will be further evidence later today by the prospective adoptive parents, we're of the opinion that while [D.O.] may not consent to this adoption, we're of the belief there's a high real likelihood that he may not actively pursue any opposition to this adoption?

B.S. A. Yes.

Respondent: Q. And that is the strategy that you and I and your parents, and later Mr. Belfonte, have adopted?

B.S. A. Yes.

S.App. 221.

* * *

Respondent: Q. And is there anyone other than [D.O.] who could possibly be the father?

B.S. A. No.

S.App. 223.

* * *

Respondent: Q. Now, [*D.O.*] has been consulted at length about this matter, has he not?

B.S. A. Yes.

Respondent: Q. You and Ms. Merryfield have met with him on at least one occasion. Has it been more than once?

B.S. A. Just once.

S.App. 225 – 226.

* * *

Respondent: Q. Even though he has been consulted, he has not stepped forward since the birth of the child claiming any rights to the child?

B.S. A. No.

Respondent: Q. And you're of the belief that there's a high likelihood that he may not do anything, is that correct?

B.S. A. Correct.

Respondent: Q. Okay. You have not advised [D.O.] or any other person that you weren't pregnant or you didn't have the child or you terminated the pregnancy. None of that has happened, has it?

B.S. A. No.

S.App. 226.

* * *

Respondent: Q. So there has been no attempt on your part to defraud or mislead anyone in this matter?

B.S. A. Correct.

S.App. 226.

* * *

[Cross-Examination of *B.S.* by Mr. Mann (guardian ad litem) while Respondent was present]

Q. . . . [F]rom the time of conception until now, has [D.O.] had the ability to make contact with you continuously if he wanted.

B.S. A. Yes.

S.App. 228.

* * *

Q. So there's never been a gap in time where he could not communicate with you?

B.S. A. No.

S.App. 228.

* * *

Q. Did he know about when the due date was?

B.S. A. Yes.

Q. Was the child more than a little bit early or late?

B.S. A. He was early.

S.App. 229.

* * *

Q. Oh. So it wasn't a couple of weeks?

B.S. A. No.

Q. Has he come to the hospital?

B.S. A. No.

S.App. 229.

* * *

[Examination of Ms. Merryfield by Respondent]:

Respondent: Q. Okay. And you've put [*B.S.* and her parents] in contact with me many weeks ago because of what we thought may be the somewhat difficult nature of this case?

Merryfield: A. Yes.

S.App. 231.

* * *

Respondent: Q. And you also met with [*B.S.* and *D.O.*] together, is that correct?

Merryfield: A. I did.

S.App. 232.

* * *

Respondent: Q. And I think it was your characterization to me that he [*D.O.*] didn't seem terribly motivated to do anything at this point?

Merryfield: A. He seemed very passive.

Respondent: Q. Okay. And he didn't seem willing to execute a consent to the adoption, is that accurate?

Merryfield: A. That's accurate.

Respondent: Q. But we're not sure that he's really going to do anything in this case?

Merryfield: A. That's right.

S.App. 232.

Respondent did not advise the judge at the hearing that the birth father had hired a lawyer. **S.App. 215 – 234.** Respondent likewise did not advise the judge of his communication with *D.O.*'s attorney or the statement made to Mr. Zimmerman that there would be no adoption without *D.O.*'s consent. **S.App. 215 – 234.** Respondent's direct examination did not include any questions to elicit the specifics of any communications between *B.S.* and *D.O.* in the weeks leading up to the birth, such as the false communication when *B.S.* lied to *D.O.* about the revised due date being pushed back to May because the baby's lungs had not developed. **S.App. 215 – 234.** Respondent's direct examination of *B.S.* did not elicit questions which explained testimony that *D.O.* had been "consulted at length about this matter." **S.App. 215 – 234.** Respondent's direct examination of *B.S.* did not include any questions to elicit testimony about the maternal grandparents' efforts to keep *D.O.* away from their daughter by threatening him with a restraining order, blocking his cell phone calls and texts, and taking away his key to their

house. **S.App. 215 – 234.** Respondent did not correct *B.S.*'s false testimony that there were no gaps in communication between her and *D.O.* **S.App. 215 – 234.**

A portion of the testimony elicited by Respondent at the April 2010 hearing was intended by Respondent to address issues arising under the Putative Father Registry. **S.App. 139 (Tr. 388).** Respondent testified: "In this case, since we weren't going to have consent by the birth father, I wanted to make sure I covered those things that were important with respect to the Putative Father Registry" **S.App. 140 (Tr. 390).**

Respondent testified that he later realized that *B.S.* provided false testimony under oath in connection with the consent to adoption and termination of parental rights hearing. **S.App. 110 (Tr. 274).** Respondent testified that "in retrospect, maybe I should have quizzed her harder. Maybe I should have delved into it, but when a client tells you they are telling you the truth, I think that that's our obligation to zealously represent our client and do what our clients want us to do." **S.App. 123 – 124 (Tr. 328 – 329).**

The decision of the disciplinary hearing panel states that the panel reached its conclusions with respect to Respondent's conduct independent of any similar findings or conclusions set forth in the Judgment of May 6, 2011. **S.App. 383.** The Circuit Court judge who presided over the trial wrote a 24-page decision, introducing the Judgment as follows:

"1. The facts of this case shock the justice system that the people of Missouri enjoy. The Court finds the actions of officers of this Court to be at minimum disturbing to the administration of justice.

2. Mr. Sanford Krigel, attorney for the biological mother, by his own sworn testimony, admits that a plan and strategy was followed by counsel and the parties not to tell [D.O.], the natural father, the following: (1) about the birth of his child, (2) that an adoptive resource had been selected, (3) that the parties proceeded to court to terminate mother's parental rights, and (4) to transfer custody of [D.O.'s] child to the adoptive resource.

3. The justification of Mr. Krigel, by his own sworn testimony under oath, was that the law did not require that a putative father be notified. In addition, by not giving the father notice, the parties hoped that the statutory timelines, detrimental to father, would run against [D.O.], the natural father.

4. These actions took place despite these facts: (1) that this child was from a three-year college relationship of mother and father, (2) that [D.O.] retained an attorney, before birth, to advise Mr. Krigel, attorney for biological mother, that [D.O.] would not consent to an adoption, (3) that at every opportunity [D.O.], natural father, asserted that he would not consent to an adoption and (4) that before birth and after birth [D.O.] was in almost daily contact with the mother, by text messages, and was deceived so he would not know his child had been born.” **S.App. 182.**

POINT RELIED ON

I.

RESPONDENT IS SUBJECT TO DISCIPLINE FOR VIOLATING THE FOLLOWING RULES OF PROFESSIONAL CONDUCT:

- (A) RULE 4-3-3(a)(3) IN THAT HE KNOWINGLY OFFERED FALSE EVIDENCE TO THE COURT AND FAILED TO TAKE REASONABLE REMEDIAL MEASURES TO CORRECT THE FALSE EVIDENCE;**
- (B) RULE 4-4.1(a) IN THAT, IN THE COURSE OF REPRESENTING *B.S.*, THE BIRTH MOTHER, HE MADE A FALSE STATEMENT OF MATERIAL FACT TO A THIRD PERSON, THE BIRTH FATHER'S ATTORNEY, OR, ALTERNATIVELY, FAILED TO DISCLOSE A MATERIAL FACT NECESSARY TO AVOID ASSISTING A FRAUDULENT ACT BY HIS CLIENT;**
- (C) RULE 4-4.4(a) IN THAT, IN THE COURSE OF REPRESENTING *B.S.*, HE USED MEANS THAT HAD NO SUBSTANTIAL PURPOSE OTHER THAN TO DELAY OR BURDEN A THIRD PARTY, THE BIRTH FATHER *D.O.*;**
AND

**(D) RULE 4-8.4(d) IN THAT HE ENGAGED IN CONDUCT
PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.**

In re Caranchini, 956 S.W.2d 910 (Mo. banc 1997)

Rule 4-3.3(a)(3)

Rule 4-4.1(a)

Rule 4-4.4(a)

Rule 4-8.4(d)

POINT RELIED ON

II.

UPON APPLICATION OF THE PREVIOUS DECISIONS OF THIS COURT, THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, AND THE DISCIPLINARY HEARING PANEL'S ADVISORY DECISION, RESPONDENT'S MULTIPLE VIOLATIONS OF THE RULES OF PROFESSIONAL CONDUCT SHOULD RESULT IN AN INDEFINITE SUSPENSION WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR SIX MONTHS.

In re Ver Dught, 825 S.W.2d 847 (Mo. banc 1992)

In re Oberhellman, 873 S.W.2d 851 (Mo. banc 1994)

In re Storment, 873 S.W.2d 227 (Mo. banc 1994)

In re Caranchini, 956 S.W.2d 910 (Mo. banc 1997)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

ARGUMENT

I.

RESPONDENT IS SUBJECT TO DISCIPLINE FOR VIOLATING THE FOLLOWING RULES OF PROFESSIONAL CONDUCT:

- (A) RULE 4-3-3(a)(3) IN THAT HE KNOWINGLY OFFERED FALSE EVIDENCE TO THE COURT AND FAILED TO TAKE REASONABLE REMEDIAL MEASURES TO CORRECT THE FALSE EVIDENCE;**
- (B) RULE 4-4.1(a) IN THAT, IN THE COURSE OF REPRESENTING *B.S.*, THE BIRTH MOTHER, HE MADE A FALSE STATEMENT OF MATERIAL FACT TO A THIRD PERSON, THE BIRTH FATHER'S ATTORNEY, OR, ALTERNATIVELY, FAILED TO DISCLOSE A MATERIAL FACT NECESSARY TO AVOID ASSISTING A FRAUDULENT ACT BY HIS CLIENT;**
- (C) RULE 4-4.4(a) IN THAT, IN THE COURSE OF REPRESENTING *B.S.*, HE USED MEANS THAT HAD NO SUBSTANTIAL PURPOSE OTHER THAN TO DELAY OR BURDEN A THIRD PARTY, THE BIRTH FATHER *D.O.*;**
AND

**(D) RULE 4-8.4(d) IN THAT HE ENGAGED IN CONDUCT
PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.**

In this attorney discipline case, the Disciplinary Hearing Panel's findings of fact and conclusions of rule violations are advisory to the Court. The Court reviews the evidence de novo, making its own determination as to the credibility of witnesses and the weight of the evidence, and draws its own conclusions of law. *In re Belz*, 258 S.W.3d 38, 41 (Mo. banc 2008). Professional misconduct must be proven by a preponderance of the evidence before discipline will be imposed. *In re Crews*, 159 S.W.3d. 355, 358. In the instant case, Informant submits that it has carried its burden and that the findings of fact and conclusions of law made by the Panel are supported by clear and convincing evidence.

The Disciplinary Hearing Panel concluded that Respondent engaged in the following professional misconduct with regard to his representation of *B.S.* and thereby violated the following rules:

- In conducting his examination of *B.S.* at the April 6, 2010 court hearing, Respondent asked questions designed to elicit answers that misrepresented the facts of the situation, as known to Respondent, and that served to mislead the Court with respect to the true circumstances of the case, in violation of Rule 4-3.3(a)(3);
- In his conversation with *D.O.*'s attorney, Jeff. Zimmerman, Respondent made a false statement that there would be no adoption without *D.O.*'s

consent and made no effort to advise the attorney otherwise, in violation of Rule 4-4.1(a);

- Under the circumstances of this case, and given Respondent's clear understanding as to the identity of the father, that the father was not willing to consent to an adoption, and that the father wanted to raise his child, Respondent's conduct, including his conversation with Mr. Zimmerman, his instructions to the mother and her family to have no communication with the father, and his overall implementation of his "passive strategy" to "actively do nothing," had no substantial purpose other than to impair and delay the father's assertion of his parental rights in violation of Rule 4-4.4(a); and
- Respondent's overall conduct in this matter, including his interaction, and failure to interact, with the father's counsel, the implementation of his "passive strategy," and his conduct at the April 6, 2010 hearing, constituted conduct prejudicial to the administration of justice, in violation of Rule 4-8.4(d).

S.App. at 383 - 384.

The attorney-client relationship between Respondent and *B.S.* was short-lived and marked by a series of sharp practices directed at the Court as well as *D.O.* and his counsel. The professional misconduct found by the Panel and described below was significant and caused substantial personal and financial harm to the birth father.

Respondent Offered False Evidence to the Trial Court

Rule 4-3.3 imposes upon a lawyer a duty of candor toward the tribunal. More specifically, Rule 4-3.3(a)(3) prohibits a lawyer from offering evidence that the lawyer knows to be false and requires that the lawyer take reasonable remedial measures should the lawyer learn of its falsity. Such conduct is an affront to the fundamental and indispensable principle that a lawyer, as an officer of the court, must proceed with absolute candor towards the tribunal. In the absence of that candor, the legal system cannot properly function. *In re Caranchini*, 956 S.W.2d 910, 919-920 (Mo. banc 1997). The Panel correctly found that Respondent violated this rule in his conduct during the April 6, 2010, court hearing before Commissioner Merrigan in Jackson County, Missouri, the purpose of which was to have *B.S.* tender her consent to terminate her parental rights, preparatory to adoption proceedings being instituted.

Neither *D.O.* nor his attorney received notice of the April 6, 2010, hearing and neither was aware of the birth of the child.¹² Respondent was present in the courtroom the entire time his client testified at the April 2010 hearing. Respondent was allowed to make any record or voice any objection at the hearing he felt necessary. Respondent made arrangements for his client, *B.S.*, to testify. Respondent also made arrangements for Ms. Merryfield to testify at the hearing. Respondent was aware that his client, *B.S.*,

¹²Neither *D.O.* nor his attorney was notified of the birth. *D.O.*'s name was not shown on the birth certificate.

was placed under oath prior to giving any testimony. Respondent discussed his intended direct examination with *B.S.* prior to the hearing. Respondent testified that the record he wanted to make with the court upon his Petition to Approve Consent and Transfer of Custody was intended to be a very quick “ten-minute hearing” because there are lots of adoptions in Jackson County and the court may have several hearings scheduled back-to-back in the same day. The testimony of *B.S.* and Ms. Merryfield elicited by Respondent at issue in the hearing¹³ is recited as follows:

Respondent: Q. Okay. Now you and I have had the unusual opportunity in that we have been talking for many, many weeks now, have we not?

B.S.: A. Yes.

Respondent: Q. Okay. We were introduced by Hillary Merryfield, is that correct?

B.S.: A. Yes.

Respondent: Q. Okay. And I’ve had an opportunity to meet with both your mother and your father. You and I have had a bunch of telephone conversations?

¹³The entire transcript of the hearing is located at **S.App. 41-180**. Excerpts from the transcript are provided below in such a fashion as to maintain the confidentiality of the sealed record.

B.S. A. Yes, we have.

Respondent: Q. And I know we had a lengthy meeting in my office, is that right?

B.S. A. Yes.

Respondent: Q. And the reason that we met several weeks before the child was born was because we were concerned what actions, if any, the biological father of the child may have, what he may or may not do with respect to this adoption, is that correct?

B.S. A. Yes.

* * *

Respondent: Q. Okay. And we've talked about [D.O.] at some length, have we not?

B.S. A. Yes.

Respondent: Q. And while there will be further evidence later today by the prospective adoptive parents, we're of the opinion that while [D.O.] may not consent to this adoption, we're of the belief there's a high real likelihood that he may not actively pursue any opposition to this adoption?

B.S. A. Yes.

Respondent: Q. And that is the strategy that you and I and your parents, and later Mr. Belfonte, have adopted?

B.S. A. Yes.

* * *

Respondent: Q. And is there anyone other than [D.O.] who could possibly be the father?

B.S. A. No.

* * *

Respondent: Q. Now, [D.O.] has been consulted at length about this matter, has he not?

B.S. A. Yes.

Respondent: Q. You and Ms. Merryfield have met with him on at least one occasion. Has it been more than once?

B.S. A. Just once.

* * *

Respondent: Q. Even though he has been consulted, he has not stepped forward since the birth of the child claiming any rights to the child?

B.S. A. No.

Respondent: Q. And you're of the belief that there's a high likelihood that he may not do anything, is that correct?

B.S. A. Correct.

Respondent: Q. Okay. You have not advised [D.O.] or any other person that you weren't pregnant or you didn't have the child or you terminated the pregnancy. None of that has happened, has it?

B.S. A. No.

* * *

Respondent: Q. So there has been no attempt on your part to defraud or mislead anyone in this matter?

B.S. A. Correct.

* * *

[Cross-Examination of B.S. by Mr. Belfonte (attorney for adoptive couple) while Respondent was present]

Q. . . . [F]rom the time of conception until now, has [D.O.] had the ability to make contact with you continuously if he wanted.

B.S. A. Yes.

* * *

Q. So there's never been a gap in time where he could not communicate with you?

B.S. A. No.

* * *

Q. Did he know about when the due date was?

B.S. A. Yes.

Q. Was the child more than a little bit early or late?

B.S. A. He was early.

* * *

Q. Oh. So it wasn't a couple of weeks?

B.S. A. No.

Q. Has he come to the hospital?

B.S. A. No.

* * *

[Examination of Ms. Merryfield by Respondent]:

Respondent: Q. Okay. And you've put [*B.S.* and her parents] in contact with me many weeks ago because of what we thought may be the somewhat difficult nature of this case?

Merryfield: A. Yes.

* * *

Respondent: Q. And you also met with [*B.S.* and *D.O.*] together, is that correct?

Merryfield: A. I did.

* * *

Respondent: Q. And I think it was your characterization to me that he [*D.O.*] didn't seem terribly motivated to do anything at this point?

Merryfield: A. He seemed very passive.

Respondent: Q. Okay. And he didn't seem willing to execute a consent to the adoption, is that accurate?

Merryfield: A. That's accurate.

Respondent: Q. But we're not sure that he's really going to do anything in this case?

Merryfield: A. That's right.

Respondent knew that the testimony of *B.S.* at the April 6, 2010, court hearing was false and that, consistent with his "passive strategy", *D.O.* had not been "consulted at length" regarding the matter. Respondent posed these questions to his client fully aware that the birth father had consistently claimed rights to the child. Thus, in the first conversation between Respondent and *D.O.*'s counsel, Zimmerman, on March 19, 2010, Zimmerman told Respondent that *D.O.* desired to raise the child and did not want to consent to an adoption. **S.App. 90, 95 (Tr. 194, 213).**

Respondent's questioning at the April 6 court hearing was designed to present to the Court the incorrect impression that *D.O.* was not interested in the birth of the child or in asserting his parental rights, when Respondent knew that was not the case. In permitting that false and misleading testimony to stand without taking reasonable remedial measures as required by the rules, Respondent violated Rule 3.3(a)(3).

Lawyers have an ethical duty to carry out the lawful objectives established by their clients. *See* Rule 4-1.2(a). That duty, however, must be met in conjunction with, rather

than in opposition to, other professional obligations. Rule 4-3.3 makes clear that lawyers must always operate within the bounds of the law and cannot offer false evidence to a tribunal. Respondent's "passive strategy" and the courtroom conduct that resulted therefrom violated both the spirit and letter of Rule 4-3.3. Specifically, Respondent's questions to his client at the April 6 hearing misled the Court into believing that *D.O.* was aware of the birth of the child, had been consulted at length about the matter and had no interest in asserting his parental rights. In fact, the opposite was true.

D.O. did not receive any notice or communication of the birth until approximately May 12, 2010, following a Facebook posting. After meeting with Ms. Merryfield, from March 23, 2010, until May 12, 2010, *D.O.* was not given a specific opportunity to tell his position as to his parental rights to any government agency, social worker, or judge. *D.O.* did not know which hospital where the birth occurred, nor even which state (as between Missouri and Kansas) where the child had been born. *D.O.* was not identified as the father on the birth certificate. *D.O.* was not provided with a copy of the birth certificate. *D.O.* was not invited to the hospital to see the child after birth.

Comment [3] to Rule 4-3.3 makes clear that there are circumstances where the failure to make a disclosure is the equivalent of an affirmative misrepresentation to the tribunal. In this case, the Respondent's line of questioning elicited false testimony from his client, testimony that Respondent knew to be false. The false testimony was clearly a substantial factor in leading the Court, at the conclusion of the April 6, 2010, Consent to

Terminate hearing, to grant *B.S.*'s Motion to Transfer Custody and for Adoption. The Panel correctly found that Respondent's conduct violated Rule 4-3.3(a)(3).

Respondent Knowingly Made a False Statement of Material Fact to a Third Person

Rule 4-4.1(a) prohibits a lawyer, in the course of representing a client, to knowingly make a false statement of material fact to a third person. In this case, the Panel correctly found that Respondent violated this rule when he told Jeff Zimmerman, the attorney for *D.O.* that there would be no adoption of the baby without the *D.O.*'s consent.

By March 19, 2010, both Respondent and Zimmerman had been retained by their respective clients to provide legal assistance in connection with the issues arising from the pregnancy and the ultimate birth of the child. On that date, Zimmerman called Respondent to discuss the matter.¹⁴ In the call, Zimmerman told Respondent that he represented *D.O.* and that *D.O.* wanted to raise the child. Zimmerman testified that he told Respondent that *D.O.* did not want to consent to an adoption. **S.App. 90, 95 (Tr. 194; Tr. 213).** Respondent testified that he does not remember Mr. Zimmerman "categorically telling me that his client didn't want the adoption to go forward." **S.App. 148 (Tr. 421).** Mr. Zimmerman testified that Respondent made a statement of fact to him during the telephone conversation that there would be no adoption without the consent of the biological father. **S.App. 97, 99 (Tr. 221-222; 229-230).** Respondent denied making

¹⁴Respondent and Zimmerman had known each other since junior high school.

such statement and denied that any statement made during the conversation was a statement of fact.

Respondent testified that he understood that a conversation such as the one he had with Zimmerman involving a potential adoption and the parental interests of expectant parents is “hugely important” because a birth and the options of parenting and adoption are “life changing, life altering, significant” events in a person’s life. **S.App. 99 (Tr. 232)**. Respondent understood the importance of parental rights and the legal rights of biological parents. **S.App. 99 (Tr. 232)**. In response, Respondent told Zimmerman that there would not be an adoption without the father’s consent. Zimmerman took Respondent’s statement to be a statement of fact upon which he and his client would be able to rely.¹⁵

At the time Respondent made the statement to Zimmerman, he knew that of its falsity. By the time of the March 19 conversation, Respondent had employed his

¹⁵Respondent testified to the Panel that his statement to Zimmerman was simply an attempt to provide Zimmerman with a statement of the controlling law in Missouri, since he knew that Zimmerman primarily practiced law in Kansas and did not believe that Zimmerman typically handled adoption or paternity matter. Respondent’s explanation is inconsistent with his “passive strategy” that he was pursuing on behalf of his client. In finding a violation of Rule 4-4.1(a), the Panel clearly did not find Respondent’s explanation credible.

“passive strategy” of actively doing nothing to communicate with *D.O.* or his counsel and not disclosing the birth of the child, his client’s plans to place the child for adoption and the initiation of adoption proceedings. Under these circumstances, Respondent knew that his March 19 statement to Zimmerman was false and that his client, in fact, would seek to place the child for adoption without the father’s knowledge or consent. The Panel properly found a violation of Rule 4-4.1(a).

Respondent’s “Passive Strategy” Delayed and Burdened *D.O.*

The Panel found that by pursuing a “passive strategy” in his legal representation of *B.S.*, Respondent had no substantial purpose other than to impair and delay *D.O.’s* assertion of his parental rights in violation of Rule 4-4.4(a). That rule, *inter alia*, prohibits a lawyer, in representing a client, from using means that have no substantial purpose other than to embarrass, delay or burden a third party. There can be no doubt that Respondent’s entire approach to carrying out his client’s objectives (i.e., placing the child for adoption) was to keep *D.O.* “in the dark” regarding the events that would have triggered the father’s right to exercise his parental rights. Rather than litigate the parties’ differences in an atmosphere of candor toward both the Court and opposing counsel, Respondent sought to prevail on behalf of his client through stealth. By its very nature, the substantial purpose of Respondent’s “passive strategy” was to achieve, through misdirection and silence, a delay in *D.O.’s* knowledge of the facts beyond the statutory time within which he could have exercised his legal rights. In carrying out this strategy,

Respondent successfully kept the birth father and his counsel “in the dark” and achieved legal success for his client. In so doing, Respondent also violated Rule 4-4.4(a).

Respondent’s “passive strategy” represents more than an outlier strategy involving a single client. Respondent testified that his “passive strategy” is not unique amongst Missouri attorneys who practice in this area of the law. **S.App. 123 (Tr. 326 – 327).** Unless the Court rules otherwise or unless the law changes, Respondent testified that he intends to utilize the same strategy in future contested adoption cases. **S.App. 123 (Tr. 326 – 327).** Professor Mary Beck, testifying as an expert witness on behalf of Respondent, opined that it was reasonable and within the ordinary practice of Missouri adoption attorneys representing the birth mother to utilize the “passive strategy” in cases where there is a known biological father who has obtained known legal representation to object to the adoption and where such biological father has made statements to the birth mother and the court-appointed social worker that he objects to the adoption. **S.App. 157 - 158 (Tr. 457 – 461).** Professor Beck also testified that the testimony elicited by Respondent at the April court hearing was consistent with usual and customary practices in the state. **S.App. 158 (Tr. 461 – 462).** Informant believes that Respondent’s “passive strategy” offends the ethical concept of fair advocacy in such cases.

Rule 4-4.4 operates as a “brake” on the zeal with which a lawyer represents a client. Accordingly, the rule prohibits any conduct that has no substantial purpose other than to delay or burden a third party. As Comment [1] to Rule 4-4.4 makes clear, responsibility to a client requires a lawyer to subordinate the interests of others to those

of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. When, as here, the lawyer employs a legal strategy based solely on an attempt to prevail through the concealment of factual information from the opposing party and his counsel, then such conduct burdens and delays a third person and violates Rule 4-4.4(a). The Panel correctly so found.

In *In re Wallingford*, 799 S.W.2d 76 (Mo. banc 1990), this Court had occasion to apply Rule 4-4.4 of the Rules of Professional Conduct in a domestic relations case involving custody of a minor child. That case involved a custody dispute in which the mother had taken the couple's minor child to the State of California without permission of the circuit court in Missouri. The father sought to clarify his custody rights in the Jackson County Circuit Court. Attorney Wallingford was charged with a violation of Rule 4-4.4 because she advised her client, the father, to pay required child support payments to the Court Administrator of Jackson County as a means of forcing the mother to enter her appearance in the Missouri litigation. When the mother made her demand for child support payments known, attorney Wallingford suggested that she could obtain information about the support payments by entering the Missouri litigation. Attorney Wallingford was charged with a violation of Rule 4-4.4 by depriving the minor child of support payments and using means that had no substantial purpose other than to burden a third person.

This Court rejected the Rule 4-4.4 charge, finding that the mother's actions in taking the child to California without leave of court violated Missouri law and that, under

the circumstances, “some pressure tactics [by Wallingford] are not necessarily inappropriate.” The Court found that Wallingford’s actions were within the bounds of vigorous representation given the mother’s unlawful conduct. *In re Wallingford*, 799 S.W.2d at 78.¹⁶

The case at bar is distinguishable from this Court’s decision in *Wallingford*. Here, Respondent’s employment of a “passive strategy” in his legal representation of *B.S.* had no substantial purpose other than to impair and delay *D.O.’s* assertion of his parental rights. Unlike Wallingford, however, *D.O.* did nothing unlawful or improper that would have justified Respondent’s sharp practices. The Panel properly found a violation of Rule 4-4.4(a).

Respondent Engaged in Conduct Prejudicial to the Administration of Justice

The Panel found that Respondent’s overall conduct in the matter, including his interactions with opposing counsel Zimmerman, his employment and implementation of his “passive strategy,” and his conduct at the April 6, 2010, court hearing, constituted conduct prejudicial to the administration of justice in violation of Rule 4-8.4(d). As discussed supra, Respondent’s conduct violated multiple provisions of Rule 4, the Rules of Professional Conduct. Together, that professional misconduct combined to support an

¹⁶The Court did find that Wallingford knowingly made a false statement of material fact to the court by falsifying affidavits and signing a false certificate of service in violation of Rule 3.3(a)(1). The Court reprimanded Wallingford.

additional violation for conduct prejudicial to the administration of justice. The Panel's conclusion in this regard is fully supported by the record evidence in this case.

ARGUMENT

II.

UPON APPLICATION OF THE PREVIOUS DECISIONS OF THIS COURT, THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, AND THE DISCIPLINARY HEARING PANEL'S ADVISORY DECISION, RESPONDENT'S MULTIPLE VIOLATIONS OF THE RULES OF PROFESSIONAL CONDUCT SHOULD RESULT IN AN INDEFINITE SUSPENSION WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR SIX MONTHS.

In determining the appropriate sanction for attorney misconduct, this Court historically relies on several sources. First and foremost, the Court applies its own standards to maintain consistency, fairness and ultimately, to accomplish the overriding goal of protecting the public and maintaining the integrity of the legal profession. Those standards are written into law when the Court issues opinions in attorney discipline cases. *In re Kazanas*, 96 S.W.3d 803, 806 (Mo. banc 2003).

The Court also relies on the ABA's *Standards for Imposing Lawyer Sanctions* (1991 ed.). Those guidelines recommend baseline discipline for specific acts of misconduct, taking into consideration the duty violated, the lawyer's mental state (level of intent), and the extent of injury or potential injury. *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994). Once the baseline discipline is known, the ABA *Standards* allow consideration of aggravating and mitigating circumstances. ABA *Standards for Imposing*

Lawyer Sanctions (1991 ed.). Of particular significance in this case, the Court considers and takes into account the Respondent's prior history of discipline.

The Court also considers as advisory the recommendation of the Disciplinary Hearing Panel who heard the case. In this instance, the Panel recommended disbarment.

The prior opinions of this Court in attorney discipline cases support suspension in this case. The purpose of attorney discipline is to protect the public and to maintain the integrity of the legal profession. *In re Caranchini*, 956 S.W.2d 910, 918-919 (Mo. banc 1997); *In re Disney*, 922 S.W.2d 12, 15 (Mo. banc 1996). In cases involving attorneys who intentionally violate their ethical duty of candor to the tribunal, this Court has levied the most severe sanctions, finding that such conduct is an affront to the fundamental and indispensable principal that a lawyer must exercise absolute candor before the court. *See In re Oberhellman*, 873 S.W.2d 851 (Mo. banc 1994) (attorney disbarred for false statements to the court regarding diversity jurisdiction and for advising client to give false deposition testimony); *In re Storment*, 873 S.W.2d 227 (Mo. banc 1994) (attorney disbarred for advising client to give false testimony in child custody case); *In re Caranchini*, 956 S.W.2d 910 (Mo. banc 1997) (attorney disbarred for knowingly offering a false document in court and making unsupported and false statements of fact to the court).

In assessing an appropriate disciplinary sanction for conduct involving false statements, the Court has examined the attorney's state of mind. As referenced above, the Court has disbarred attorneys who have acted intentionally to deceive the court and

thereby caused serious or potentially serious injury party or caused a significant or potentially significant adverse effect on the legal proceeding. See *In re Oberhellman*, 873 S.W.2d 851 (Mo. banc 1994); *In re Storment*, 873 S.W.2d 227 (Mo. banc 1994); *In re Caranchini*, 956 S.W.2d 910 (Mo. banc 1997).

The Court has suspended those attorneys who knowingly submit false statements to the court, or who know that material information is being withheld, and take no remedial action, thus causing injury or potential injury to a party, or an adverse or potentially adverse effect on the legal proceeding. *In re Ver Dught*, 825 S.W.2d 847 (Mo. banc 1992).

The *Ver Dught* case is particularly relevant. In that case, the client was denied Supplemental Security Income (SSI) and Disabled Widow's Benefits (DWB) following the death of her first husband. She appealed the denial under the last name of her second husband "Gilmore," from whom she was divorced, and retained attorney Ver Dught to represent her. During the pendency of the appeal, the client informed Ver Dught that she was living with another man and intended to marry him. Concerned regarding the effect that the remarriage would have on the client's eligibility, Ver Dught advised the client "to go slow and to not marry him at this time without further consideration and a lot of thought about it." 825 S.W.2d at 847.

Client ignored Ver Dught's advice, remarried and changed her last name to "Croney". After becoming aware of the name change, Ver Dught failed to amend the client's pending SSI and DWB applications. In addition, in preparing the client for her

testimony on her appeal hearing, Ver Dught told the client “that if your name doesn’t come up, don’t mention it.” 825 S.W.2d at 849. At the hearing on the client’s appeal, Ver Dught asked and elicited the following testimony from his client:

Question [Respondent]: Could you state your name and address?

Answer: Vera Mae Gilmore, Route 1, Box 154, Bates
City, Missouri.

* * *

Q: During your married life, which I believe was to two different husbands—

A: Yes.

* * *

Q: Now, Vera, your last name now is Gilmore, but at the time in Oregon you were married to David Brown? That was your husband?

A: Yes, I was married to David Brown. I was married for 31 years.

* * *

Q [Judge Starr]: How did you get here today?

A: With my sisters, and a fellow brought us up.

825 S.W.2d at 849.

On two occasions during the court hearing, Ver Dught referred to his client as “Vera Gilmore” and the Administrative Law Judge so addressed her at the close of the

hearing. In ruling partially in favor of Ver Dught's client on the appeal, ALJ Starr found that the client was "not presently married", an untrue statement of fact.

This Court found that Ver Dught knew when his client testified at the court hearing that she had remarried. The Court further found that Ver Dught's questioning of his client was designed to mislead the judge as the client's marital status. Most significantly, the Court held that Ver Dught's "participation was not passive, he specifically asked questions of witnesses at the hearing calling for answers that he knew were false." 825 S.W.2d at 851. The Court found violations of Rule 3.3(a)(4)¹⁷ (knowingly offering false evidence), Rule 8.4(c) (conduct involving dishonesty), and Rule 8.4(d) (conduct prejudicial to the administration of justice). The Court suspended Ver Dught from the practice of law for six months. *Id.* at 851.

Respondent's conduct in the case at bar is analogous to the *Van Dught* case. Here, in conducting his examination of his client *B.S.* at the April 6, 2010 hearing, Respondent asked questions designed to elicit answers that misrepresented the facts of the situation. In response to Respondent's questions, *B.S.* testified falsely that *D.O.* had been consulted at length about the matter and had not stepped forward since the birth of the child to claim any rights. Respondent's conduct at the court hearing violated Rule 4-3.3(a)(3) and Rule 4-8.4(d) and caused significant and serious injury to *D.O.* and to the administration

¹⁷Rule 3.3(a)(4) is identical to current Rule 4-3.3(a)(3) and prohibits a lawyer from knowingly offering evidence that the lawyer knows to be false.

of justice. Such misconduct warrants a suspension of Respondent's license to practice law.

Application of the ABA Standards for Imposing Lawyer Sanctions support suspension in this case. The Court routinely relies on the ABA Standards for Imposing Lawyer Sanctions for guidance in determining the appropriate discipline. *In re Coleman*, 295 S.W.3d 857, 869 (Mo. banc 2009). At the outset, the ABA's guidelines consider the lawyer's duties, mental state, and the potential or actual injury caused by the misconduct. Upon the completion of that analysis, aggravating and mitigating circumstances should be considered. Finally, the ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations. ABA Standards for Imposing Lawyer Sanctions (Theoretical Framework) (1991 ed.).

The most serious misconduct in the case at bar is Respondent's violation of his duties owed to the legal system by knowingly offering false evidence to the tribunal. According to the applicable ABA Standards, (i) disbarment is appropriate when the lawyer, with the intent to deceive the court, makes a false statement or submits a false document, or improperly withholds material information and causes serious or potentially serious injury to a party or causes significant or potentially significant adverse effect on the legal proceeding, (ii) suspension is appropriate when the lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party or causes an adverse or potentially adverse effect on the legal

proceeding, and (iii) reprimand is appropriate when the lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party, or causes an adverse or potentially adverse effect on the legal proceeding. *ABA Standards 6.11, 6.12 and 6.13.*

The Disciplinary Hearing Panel properly found that Respondent acted knowingly in violation of Rule 4-3.3(a)(3) and that ABA Standard 6.12 supported suspension of his license to practice law. In addition, the following serious, actual injury to both *D.O.* and the legal proceeding resulted from Respondent's misconduct:

- *D.O.*'s first contact with the child was in a one hour supervised visit when the child was two months old;
- *D.O.* next saw the child in one and one-half hour weekly supervised visits that began when the child was five months old;
- After litigating visitation issues, *D.O.* obtained unsupervised visitation rights for seven hours a week when the child was eight months old. During all of this time, the child was in the custody of the proposed adoptive parents;
- *D.O.* or his family incurred between \$50,000 and \$70,000 in attorney's fees in establishing *D.O.*'s parental rights and in opposing the adoption; and

- Additional judicial proceedings were required to correct the court's ruling that resulted from Respondent's misconduct and the false court testimony that the misconduct elicited at the April 6, 2010, hearing.

Under the ABA Standards, once a baseline is established, aggravating and mitigating circumstances should be considered. The Panel decision does not address this issue. Nevertheless, Informant submits that the following aggravating circumstances under the ABA Standards are present in this case:

9.22(b) Dishonest or Selfish Motive

Respondent's conduct in eliciting false testimony from his client at the April 6, 2010, hearing and in making a material misstatement of fact to *D.O.*'s attorney are reflective of a dishonest motive.

9.22(d) Multiple offenses

The Panel properly found violations of multiple rules involving knowingly offering false evidence to the tribunal (Rule 4-3.3), making a material misstatement of fact to a third person (Rule 4-4.1), and engaging in conduct prejudicial to the administration of justice (Rule 4-8.4(d)).

9.22(g) Refusal to acknowledge the wrongful nature of the conduct

Throughout these proceedings, Respondent has steadfastly refused to acknowledge that his overall "passive strategy", his statements to *D.O.*'s counsel, or his conduct at the April 6, 2010 court hearing were wrongful;

9.22(i) Substantial experience in the practice of law

Respondent has been a practicing attorney for 35 years.

Informant submits that the following mitigating circumstances under the *ABA Standards* are present in this case:

9.32(a) Absence of a prior disciplinary record

Respondent had no disciplinary history prior to the misconduct in this case.

The Disciplinary Hearing Panel recommended that Respondent be suspended from the practice of law. The Disciplinary Hearing Panel concluded that Respondent engaged in the following professional misconduct with regard to his representation of *B.S.* and thereby violated the following rules:

- In conducting his examination of *B.S.* at the April 6, 2010 court hearing, Respondent asked questions designed to elicit answers that misrepresented the facts of the situation, as known to Respondent, and that served to mislead the Court with respect to the true circumstances of the case, in violation of Rule 4-3.3(a)(3);
- In his conversation with *D.O.*'s attorney, Jeff. Zimmerman, Respondent made a false statement that there would be no adoption without *D.O.*'s consent and made no effort to advise the attorney otherwise, in violation of Rule 4-4.1(a);
- Under the circumstances of this case, and given Respondent's clear understanding as to the identity of the father, that the father was not

- willing to consent to an adoption, and that the father wanted to raise his child, Respondent's conduct, including his conversation with Mr. Zimmerman, his instructions to the mother and her family to have no communication with the father, and his overall implementation of his "passive strategy" to "actively do nothing," had no substantial purpose other than to impair and delay the father's assertion of his parental rights in violation of Rule 4-4.4(a); and
- Respondent's overall conduct in this matter, including his interaction, and failure to interact, with the father's counsel, the implementation of his "passive strategy," and his conduct at the April 6, 2010 hearing, constituted conduct prejudicial to the administration of justice, in violation of Rule 4-8.4(d).

In an attorney discipline case, the disciplinary hearing panel's findings of fact, conclusions of law and recommendation are advisory in nature. This Court reviews the evidence *de novo*, independently determines the credibility, weight, and value of the testimony of the witnesses and draws its own conclusions of law. *In re Snyder*, 35 S.W.3d 380 (Mo. banc 2000); *In re Oberhellman*, 873 S.W.2d 851, 852 (Mo. banc 1994).

The Panel's decision in this case recommending that Respondent be suspended from the practice of law is consistent with the preponderance of the evidence, this Court's prior decisions in attorney discipline cases, and the ABA Standards.

CONCLUSION

For the reasons set forth above, the Chief Disciplinary Counsel respectfully requests this Court:

- (a) to find that Respondent violated Rules 4-3.3(a)(3), 4-4.1, 4-8.4(a) and 4-8.4(d) of the Rules of Professional Conduct;
- (b) to indefinitely suspend Respondent from the practice of law with no leave to apply for reinstatement until after six months; and
- (c) to tax all costs in this matter to Respondent, including the \$1000 fee pursuant to Rule 5.19(h).

Respectfully submitted,

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By:

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ATTORNEY FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 2015, a copy of Informant's Brief is being served upon Respondent and Respondent's counsel through the Missouri Supreme Court electronic filing system pursuant to Rule 103.08:

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CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(c);
3. Contains 15,465 words, according to Microsoft Word, which is the word

processing system used to prepare this brief.

A handwritten signature in black ink, reading "Kevin J. Odrowski". The signature is written in a cursive, slightly slanted style.

Kevin J. Odrowski